No. 97-58

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In The

Supreme Court of the United States

October Term, 1996

LYNN DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity,

Petitioner,

v.

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, KANSAS, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OREGON, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WISCONSIN, AND WYOMING IN SUPPORT OF PETITIONER

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INTEREST OF AMICI STATES

The Seventh Circuit Court of Appeals has issued a clearly erroneous decision which requires the State of Illinois to refashion its system for determining eligibility for unemployment insurance benefits. Because the great majority of the states utilize substantially the same eligibility determination system that was overturned by the Seventh Circuit, the legality of their eligibility determinations systems is also in question. This will lead to unnecessary litigation in states and jurisdictions throughout the nation, litigation that has already begun in at least one such state.

In this case, the Court of Appeals affirmed a permanent injunction enjoining the application of an Illinois statute which prescribes the time period over which wage earnings will be counted for the purpose of determining eligibility for state unemployment insurance benefits (the "base period"). The Court of Appeals held that the Illinois statute is a "method[ ] of administration" within the meaning of section 303(a)(1) of the Social Security Act (the "Act") and, therefore, is subject to the Act's requirement that a state pay benefits "when due," rather than being an eligibility standard, which is not subject to this requirement. 49 Stat. 626, as amended, 42 U.S.C. § 503(a)(1) (1997). Under applicable federal regulations, the "when due" requirement has been interpreted to require full payment "with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a) (1996).

The Court of Appeals originally reached this decision in 1994. At that time, it remanded this case to District Court for factual findings and a determination as to

whether the Illinois base period statute did, in fact, comply with section 303(a)(1). The District Court was instructed to determine whether the Illinois statute "insures the greatest promptness in paying unemployment benefits that is administratively feasible." *Pennington v. Didrickson*, 22 F.3d 1376, 1388 (7th Cir. 1994) ("*Pennington I*").

The District Court subsequently found that the Illinois statute did violate the "when due" clause of section 303(a)(1) and, therefore, enjoined the statute's application to the plaintiff class. (App. 67.)[1] That decision was appealed to the Seventh Circuit, which reaffirmed its holding in *Pennington I* and upheld the District Court's decision on remand based upon findings that it is administratively feasible to utilize an alternate base period ("ABP") which would result in the prompter payment of benefits than the existing Illinois base period. *Pennington v. Didrickson*, 110 F.3d 502, 508 (7th Cir. 1997) ("*Pennington II*").

Not only does the Seventh Circuit decision in *Pennington II* require the creation and implementation of a costly new base period system in Illinois, raising the possibility of similar requirements by courts in other states, it also leaves the door open for further challenges to all base period systems, including that of Illinois, anytime it can be shown that another base period system could be implemented which will result in an even prompter determination of eligibility.

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[1] All references to "App." refer to the Appendix to Illinois' Petition for Writ of Certiorari ("Petition").

As noted in Illinois' petition for writ of certiorari, at least forty-two other states and jurisdictions have base period statutes similar to the Illinois statute. (Petition, pp. 9-10, and n.4.) Those base period statutes were drafted in conformity with suggested legislation ("draft bills") that was prepared by the United States Department of Labor ("USDOL") to guide the states in crafting their individual unemployment statutes.

In reaching its decision, the Court of Appeals refused to defer to the construction of section 303(a)(1) of the Act by the USDOL, which presented its interpretation in an amicus brief indicating that base periods like that utilized by Illinois comply with the Act. That USDOL interpretation is consistent with its long-standing recognition of the exclusive right of the states to develop their own eligibility standards, which includes the sole right to define and utilize base periods.

Amici states now face the likely prospect of legal challenges because of the confusion and uncertainty created by the Seventh Circuit's decisions. In fact, such litigation has already been commenced in California, the state with the largest unemployment system. *AFL-CIO v. Bradshaw*, No. C 97-0166 CAL (N.D. Cal.) These legal challenges will impose substantial defense burdens on each amici state, since each will be forced to defend its particular base period and related wage information collection systems, should the Court of Appeals' decision in this case be followed in its jurisdiction.

Furthermore, if base period statutes in other jurisdictions are found to be subject to and out of compliance with section 303(a)(1), massive and costly restructuring of state unemployment wage information collection and

processing systems will likely be necessary.[2] For example, the District Court in *Pennington* found an ABP would result in up to $40 million per year in increased benefit payouts, $13.5 million in conversion costs and $2.6 million in additional annual expenses.[3] (App. 65.) Given that there are forty-two states with base periods like that of Illinois, the cumulative total cost impact will be a very substantial sum.[4]

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[2] The ultimate impact of the *Pennington* decision on state unemployment systems is a matter of special concern to states with larger systems, such as California which has the most claims filed of any of the states. A recent USDOL report of regular unemployment benefit claims filed over a 12-month period shows there were 3,243,297 initial claims filed in California. By comparison, Illinois had 687,746 claims filed and Arkansas had 226,703 during that same period. UI Data Summary, UIS, 1st Quarter CY97, USDOL, Unemployment Insurance Service, Division of Actuarial Services, May 1997.

[3] In California, estimates of the cost of converting the existing base period to an ABP which would count wages earned in the 52 weeks immediately preceding the filing of a claim, are $12.2 million in administrative costs and $92.7 million in increased benefit payments. (Cost estimate cited by plaintiffs and defendant in *AFL-CIO v. Bradshaw*, No. C 97-0166 CAL (N.D. Cal.). Cost estimates have also been prepared by the State of Arkansas, which estimates the administrative costs of an ABP to be as high as $12 million initially, plus $2 million annually, and increased benefit payments of up to $15.2 million. (Arkansas Employment Security Department, memorandum to governor dated May 29, 1996.)

[4] The fact that the major portion of the cost impact estimates for utilizing ABPs consists of increased benefit payments is a clear indication that base periods operate as eligibility standards.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred when it held that the Illinois base period statute, which clearly is identified and operates as an eligibility provision, is an "administrative method" and, therefore, subject to the prompt payment "when due" clause of section 303(a)(1). The Court of Appeals would not have reached this incorrect result had it deferred to the interpretations of the USDOL in this regard. As a result of the Court of Appeals' decision, unemployment benefit claimants in other states will be encouraged to pursue similar litigation in their states, which will place unnecessary burdens on those other states in defending their statutes, as well as heavy burdens on the trial and appellate courts.

ARGUMENT

I

THE COURT OF APPEALS FAILED TO DEFER TO USDOL'S REASONABLE AND LONG-STANDING INTERPRETATION THAT BASE PERIODS ARE MATTERS FOR THE STATES TO DETERMINE AND ARE NOT METHODS OF ADMINISTRATION SUBJECT TO THE "WHEN DUE" CLAUSE OF THE SOCIAL SECURITY ACT

State unemployment insurance programs are operated cooperatively with the federal government, which provides federal funding to cover state administrative costs. *See, California Dept. of Human Resources v. Java*, 402 U.S. 121, 125 (1971); 42 U.S.C. § 502(a) (1997). Although Congress chose to regulate certain specified aspects of

unemployment insurance programs; the states were given broad latitude to develop their own unemployment compensation programs. *New York Tel. Co. v. New York Labor Dept.*, 440 U.S. 519, 537 (1979). This broad latitude is especially apparent with regard to the freedom of the states to develop their own eligibility criteria. *Id.* at 539. As stated by this Court:

> "We further noted that when Congress wished to impose or forbid a condition for compensation, it did so explicitly; the absence of such an explicit condition was therefore accepted as a strong indication that Congress did not intend to restrict the States' freedom to legislate in this area."

Id. at 537-538.

One of the areas that Congress chose to regulate concerns the "methods of administration" utilized by the states in administering their unemployment insurance programs. 42 U.S.C. § 503(a)(1). In this regard, section 303(a)(1) of the Social Security Act provides:

> "(a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor . . . includes provision for –
>
> > "(1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due. . . . "

The Secretary of Labor has interpreted this language as requiring "such methods of administration as will reasonable [*sic*] insure the full payment of unemployment

benefits to eligible claimants with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a).

It is undisputed that substantive state unemployment insurance eligibility requirements are not considered to be "methods of administration" and, therefore, are not subject to the "when due" clause. *See Pennington I*, 22 F.3d at 1381, n.4, and *Pennington II*, 110 F.3d at 504.

Section 500 of the Illinois unemployment insurance act provides:

> "An unemployed individual shall be eligible to receive benefits with respect to any week only if the Director [of the Illinois Department of Employment Security] finds that:
>
> "E. . . . he has been paid during his base period wages for insured work equal to not less than [the minimum amounts specified in the statute]. . . . "

820 ILCS 405/500E (1996).

Illinois defines "base period" as "the first four of the last five completed calendar quarters immediately preceding the benefit year." 820 ILCS 405/237 (1996). The "benefit year" begins on the first day of the week that a valid claim is filed. 820 ILCS 405/242 (1996). In accordance with the above, no earnings are considered from the fifth quarter, which is characterized as the "lag quarter," or the sixth quarter, the quarter in which the claimant files, in determining eligibility for benefits.

The existence of this lag quarter is the focus of respondents' complaint. *Pennington I*, 22 F.3d at 1379. Respondents contend that the presence of a lag period

operates to delay the payment of benefits to those claimants who initially lack sufficient earnings to qualify for benefits but would be eligible for benefits if their lag period earnings were counted. This could occur if they file a claim during a later quarter. (*Id.*)

In determining the applicability of section 303(a)(1) of the Social Security Act to the Illinois base period statute, the Court of Appeals held that the state's base period definition is an "administrative method" subject to the "when due" clause. *Pennington I*, 22 F.3d at 1388; *Pennington II*, 110 F.3d at 503. The court reached this holding despite the fact that the Illinois base period statute does not address the subject of *when* benefits must be paid. The court failed to accept the fact that the base period statute is intended to be, and operates as, a substantive standard for determining eligibility for benefits, i.e., a standard for determining *whether* benefits are payable.

In reaching its holding, the Court of Appeals considered, but rejected, the contrary position of the USDOL which appeared as amicus curiae below, in support of Illinois. In its amicus brief, the USDOL took the position that the Illinois base period standard is a legitimate eligibility requirement that defines what earnings will be considered in determining whether benefits are due. Brief For The United States of America As Amicus Curiae Supporting the Appellee, before the U.S. Court of Appeals for the Seventh Circuit, May 14, 1992, pp. 7, 16. The USDOL noted that it has repeatedly indicated that base periods like that used by Illinois meet federal requirements. *Id.* at 13.

By failing to defer to the position of the agency which administers the provisions of the Social Security Act relating to unemployment compensation, on a matter not specifically addressed in the Act, the Court of Appeals failed to adhere to well-established precedent of this Court. That precedent holds that a court should defer to reasonable interpretations of a federal statute by an agency that administers the statute, provided that the statute is ambiguous or does not address the specific matter at issue and, provided further, that the agency's interpretations are based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-845 (1984); *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 414 (1992); *Auer v. Robbins*, ___ U.S. ___, 117 S.Ct. 905, 912 (1997).

The Court of Appeals characterized the USDOL's interpretations of section 303(a)(1) as " 'agency litigating positions,' " not entitled to deference when they are " 'unsupported by regulations, rulings or administrative practice.' " *Pennington I*, 22 F.3d at 1383; *quoting* from *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). The Court of Appeals placed great emphasis on what it considered to be a lack of "formal regulations" reflecting the USDOL's interpretations. *Pennington I*, at 1383-1384. The court also emphasized that there is no formal USDOL regulation directly stating that "the length of lag periods is a matter of eligibility within the exclusive authority of the states." *Id.* at 1383.[5]

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[5] However, the existence of formal regulations is not the only basis for judicial deference. As noted in the quoted excerpt

The standard for deference applied in this instance by the Court of Appeals is too narrow; it does not conform with the standards specified in the above-cited decisions of this Court. Specifically, the Court of Appeals' action directly conflicts with the recent decision of this Court in *Auer v. Robbins*, which held that a USDOL construction of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201 et seq., presented by way of amicus brief, was fully entitled to deference. *Auer v. Robbins*, 117 S.Ct. at 911-912. This Court noted that just because the interpretation was received by way of a legal brief did not in any sense make it unworthy of deference, as a "post hoc rationalization." *Id.* at 912, citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. at 212. This Court noted that "[t]here is simp[illegible] no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 117 S.Ct. at 912.

Here, not only is there no reason to suspect the USDOL's interpretation, that interpretation is consistent

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from *Bowen*, judicial deference is also appropriate if the agency interpretation is supported by "rulings, or agency practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212.

Furthermore, there is no reason for the USDOL to adopt a regulation indicating that it does not regulate the length of state lag periods because they are not methods of administration. Since neither Congress nor the USDOL comprehensively regulate state unemployment insurance programs there is no need for the USDOL to spell out those areas it does not regulate. Instead, the USDOL's regulations specify certain standards and restrictions in those limited areas where it does have authority to regulate.

with USDOL regulations and its long-standing interpretations relating to base periods. In this regard, the USDOL has adopted regulations which expressly implement the provisions of section 303(a)(1) of the Act regarding "methods of administration" and the "when due" clause. *See* 20 C.F.R parts 640 and 650 (1996).

Part 640 of the USDOL regulations sets out specific time standards for prompt payment of unemployment benefits by the states. 20 C.F.R § 640.5 (1996). Part 650 prescribes specific time periods for prompt state administrative hearing and decision processes relating to benefit appeals. 20 C.F.R § 650.4 (1996). These implementing regulations single out the states' procedures for the payment of benefits and for appeals as "methods of administration" referred to in section 303(a)(1) of the Act. The regulations are designed to insure the prompt payment of unemployment benefits, including the prompt determination of eligibility, "when determined under the State law to be due." 20 C.F.R. § 640.1(a)(1), (2) (1996). Nowhere in USDOL regulations are base period standards identified as "methods of administration" governed by the USDOL regulations.[6]

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[6] With regard to the issue of promptness of payment, the regulations note:

> "Accordingly, implicit in prompt performance with respect to benefit payments is the corresponding need for promptness by the State in making determinations of eligibility. However, applicable Federal laws provide no authority for the Secretary of Labor to determine the eligibility of individuals under a State law."

20 C.F.R. § 640.1(b).

Thus, the regulations expressly recognize that although the USDOL may regulate state *procedures* for paying benefits and

Additionally, in several places in its regulations USDOL expressly recognizes that state law, not federal law or regulation, determines applicable base periods. *See*, 20 C.F.R. §§ 609.2(c), 609.3(a) (1996) (unemployed federal civilian employees are subject to base periods defined by state law); 20 C.F.R. §§ 614.2(c), 614.3(a) (1996) (same rule for unemployed individuals separated from the Armed Forces); and 20 C.F.R. § 615.2(b) (1996) (base period for purposes of receiving extended benefits is determined under state law).

In addition to the above formal rules, 60 years ago the USDOL issued policy interpretations relating specifically to base periods. These interpretations are reflected in "draft bills" for suggested state unemployment compensation laws, issued by the USDOL in 1937. In the draft bills, the USDOL placed a base period standard in the section containing *suggested eligibility* criteria. That particular base period standard provides for a lag quarter just like that used in the Illinois statute. Social Security Board, Draft Bills For State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types, revised edition, January 1937, § 4(e).[7] Nevertheless, the

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determining eligibility, it may not regulate in an area which encroaches upon the permissible content of specific eligibility criteria. Such encroachment clearly occurred in this case, where the Seventh Circuit held that the length of state base periods is subject to the "when due" clause.

[7] The draft bill notes that it is "merely suggestive" and "is in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and the right of each State to determine for itself just what type of legislation it

Court of Appeals disregarded these interpretations by the USDOL because it considered them to be ambiguous, noting that they were not adopted as formal regulations. *Pennington I*, 22 F.3d at 1384.

The Court of Appeals should have deferred to the USDOL's reasonable interpretation of section 303(a)(1), as reflected in its amicus brief below. Not only is the USDOL's interpretation clearly stated in its amicus brief, that position is also reflected in the USDOL's existing

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desires." The draft bill provides as follows regarding base periods:

> "Benefit Eligibility Conditions
>
> "Sec. 4 An unemployed individual shall be eligible to receive benefits with respect to any week only if the commissioner finds that
>
> " . . . . . .
>
> "(e) He has within the first four out of the last five completed calendar quarters immediately preceding the first day of his benefit year, earned wages for employment by employers equal to not less than sixteen times his weekly benefit amount."

Social Security Board, Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types, pp. 1, 19, 20 (1937).

(An errata sheet for the draft bills changed the above to read "the first *three* out of the last *four* completed calendar quarters . . . ," without changing the concept of a "lag" quarter.)

The original California base period statute, adopted in 1939, tracks the draft bill:

> "Sec 52.2 The term 'base period' means the first four out of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year."

Stats. Cal., c. 674, § 52.2, p. 2148 (1939).

regulations and the long-standing interpretations contained in its draft bills. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212. Those regulations and draft bills clearly show that the USDOL considers base periods to be eligibility criteria and, therefore, not subject to the "when due" clause of section 303(a)(1). There is no ambiguity with regard to the USDOL's position in this respect.[8]

II

IF THE ERRONEOUS DECISION BELOW IS ALLOWED TO STAND WITHOUT REVIEW BY THIS COURT, IT WILL BREED A MULTIPLICITY OF UNNECESSARY LITIGATION

Given that there are at least forty-two other states and jurisdictions with base period statutes similar to that of Illinois, there is a significant likelihood that a multitude of lawsuits will be filed in other states, prompted by the Seventh Circuit's decisions in *Pennington I* and *II*. As previously noted, such litigation has already begun in California.[9] *AFL-CIO v. Bradshaw*, No. C 97-0166 CAL

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[8] This fact is made abundantly clear in the recent testimony before Congress of the Deputy Assistant Secretary for the USDOL, Mr. Raymond Uhalde. Mr. Uhalde testified that the USDOL current and historic position is that the right to determine base periods is "an eligibility issue, a determination of the States." *See, Unemployment Insurance Issues, Hearings Before the Subcomm. on Human Resources, House Comm. on Ways and Means*, 104th Cong., 2nd Sess., pp. 6, 27-28 (July 11, 1996) (statement of Raymond Uhalde, Dep. Asst. Secty. USDOL).

[9] California defines its base period in the following manner:

> § 1275. "Unemployment compensation benefit award computations shall be based on wages paid in

(N.D. Cal.) It will conserve precious judicial resources to have the base period issue resolved by this Court now, rather than forcing its resolution by the other circuit courts of appeals on a case by case basis.

Resolution of the issue by this Court will also ensure harmony among the circuits in this area of the law. Although amici states believe that the Seventh Circuit clearly misconstrued the application of section 303(a)(1), some district and circuit courts considering the issue may follow the Seventh Circuit's lead. The probability of such an outcome is significant given the likelihood of a multitude of legal challenges in jurisdictions and states throughout the nation.

In those trial and appellate courts that follow the holding of the Seventh Circuit that the "when due" clause applies to base periods standards, the states will be forced to justify any perceived time delays caused by lag periods in their base period statutes. This will impose severe defense burdens upon the states, since the issue of whether a base period is in compliance with the "when

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> the base period. 'Base period' means: for benefit years beginning in November, December, or January, the four calendar quarters ended in the next preceding month of June; for benefit years beginning in February, March, or April, the four calendar quarters ended in the next preceding month of September; for benefit years beginning in May, June, or July, the four calendar quarters ended in the next preceding month of December; for benefit years beginning in August, September, or October, the four calendar quarters ended with the next preceding month of March. . . . "

Cal. Unemp. Ins. Code § 1275 (West 1986).

due" standard is factually very complex and full of uncertainties, especially given its relationship to each state's capacity to collect and process wage data. The compliance issue will be determined based upon the standard of section 640.3(a), that payments be made "with the greatest promptness that is administratively feasible." 20 C.F.R. § 640.3(a). Furthermore, if a state base period standard is determined to be out of compliance with the "when due" clause, additional difficulties will occur in determining what modifications to state unemployment systems will be necessary, how those modifications will be implemented and at what cost. The complexity of the problem is illustrated by the lengthy factual findings that were made by the District Court on remand from *Pennington I*. (App. 44-60.)

Further complicating matters is the fact that even if a state loses litigation on the base period issue and, therefore, revamps its base period system, that system is still open to additional challenge anytime a potential plaintiff believes that a state's base period could be further modified to pay benefits sooner. The cases filed to date present a good example of this danger. In the pending California litigation, plaintiffs seek to have an ABP that would include wages for the period ending as late as one week before a claim is filed. Specifically, the plaintiffs therein have proposed an ABP consisting of the fifty-two weeks immediately preceding the filing of a claim. *AFL-CIO v. Bradshaw*, No. C 97-0166 CAL (N.D. Cal.), Complaint For Injunctive And Declaratory Relief, filed Jan. 15, 1997.

In *Pennington*, the two ABPs proposed by plaintiffs would include lag quarter wages in a modified Illinois

base period, but would still not count wages earned in the filing quarter. (App. 54.) Thus, even if so modified the Illinois base period system would still be open to future legal challenges by plaintiffs seeking to include filing quarter earnings, such as the plaintiffs in California.

Finally, the Court of Appeals suggests that the USDOL can always "issue regulations outlining in more detail what is and is not an acceptable lag period under the regulations." *Pennington I*, 22 F.3d at 1388, n.9. However, such action is highly unlikely given that the USDOL is not bound by the Court of Appeals' decision and the USDOL has taken the position that base periods are not subject to the "when due" clause. The likely result will be that the courts in different states will be forced to determine what is administratively feasible in base period criteria to achieve prompt payment. That will likely yield varying results among the states.

In contrast, if this Court were to rule on the application of the "when due" clause to base periods standards, the result will either be maintenance of the status quo if *Pennington* is reversed or, if the opposite occurs, adoption of a uniform standard for all the states. Thus, if this Court were to find that the "when due" clause does apply to base periods standards, it is very likely that the USDOL would in that event adopt base period regulations for all the states. This is exactly what happened after this Court issued its decision in *California Dept. of Human Resources v. Java*, 402 U.S. 121 (1971).[10] See 20 C.F.R. § 650.1(a).

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[10] *Java* is discussed on page 13 of the Petition.

Therefore, it will conserve judicial resources, promote harmony among the circuits, and protect the states from unnecessary and costly litigation if this Court accepts this case for review.

CONCLUSION

Resolution by this Court of the question of whether Illinois' base period standard is a method of administration or an eligibility criterion is of immediate and vital importance to each of the amici states and to virtually every other state in the Union. Amici urge the Court to grant Illinois' petition.

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Respectfully submitted,

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